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No. 73-398

In the Supreme Court of the United States

OCTOBER TERM, 1973

SEYMOUR EMALFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court's instruction on reasonable doubt constituted reversible error.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of extortion, in violation of 18 U.S.C. 1951. He received concurrent three year sentences (ninety days confinement with the remainder on probation) and was fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App. A).

The instruction complained of is set forth below in its entirety:

> Now, what do we mean by beyond a reasonable doubt? Well, a reasonable doubt is a fair doubt which arises from all of the evidence in the case. The law doesn't require, in fact, we know it is

> rarely possible to establish something to an absolute certainty, and that isn't what beyond a reasonable doubt means.
>
> Beyond a reasonable doubt means the evidence be of such persuasion to you that you would be willing to rely upon that kind of evidence in making an important decision in your own personal lives. Presumably you would not make an important decision on evidence which was not, did not satisfy you beyond a reasonable doubt. Otherwise you are taking a calculated risk. You are gambling on something. Here you are not supposed to gamble on the guilt or innocence of the defendant. You are to find him innocent unless you are satisfied that his guilt has been established beyond a reasonable doubt [Tr. 1038-1039].

In summarizing the instructions to the jury, the court stated (Tr. 1061-1062):

> Start out presuming the defendant to be innocent and the Government must prove his guilt beyond a reasonable doubt, which means by evidence of such persuasion that you would be willing to rely upon it in an important affair in your own life.

The court below, on whose opinion we rely, properly noted (Pet. App. 7-9) that this language, while not the language preferred under *Holland* v. *United States*, 348 U.S. 121, nevertheless was upheld by this Court because it could not mislead the jury into using too lax a standard. Indeed, as this Court said in *Holland* (*id.* at 140):

> "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles* v. *United States*,

103 U.S. 304, 312, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.

The Seventh Circuit made plain in this case that, in the future, it expects district courts to follow the "hesitancy to act" language preferred by *Holland*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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